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6 UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

7 KANDI ROSE ROBERTS, )

8 Petitioner, )

9 v. )

10 UNITED STATES OF AMERICA, )

11 Respondent. )  
12 \_\_\_\_\_)

CASE NO. C08-1568-JLR-JPD  
(CR06-42-JLR)

REPORT AND RECOMMENDATION

13 INTRODUCTION

14 Petitioner has filed a motion under 28 U.S.C. § 2255 to vacate, set aside, or correct her  
15 sentence. The government has filed an answer and petitioner has filed a response to the answer.  
16 Having considered the documents submitted by the parties, and the balance of the record, the  
17 court concludes, for the reasons set forth below, that petitioner's § 2255 motion should be  
18 denied.

19 BACKGROUND

20 Petitioner pled guilty on March 14, 2007 to fraudulent use of another person's  
21 identification, wire fraud, false claims to the IRS, and related offenses. (Dkt. No. 31 in Case  
22 No. CR06-42-JLR). As part of her plea agreement, petitioner agreed to terms that subjected her  
23 under the advisory Sentencing Guidelines to a possible range of 30 to 37 months in prison. (*Id.*  
24 at 14). Prior to her sentencing, counsel for petitioner filed a sentencing memorandum in which  
25 he argued that due to issues concerning her physical and mental health, she should be sentenced  
26 to one year and a day. (Dkt. No. 40 in Case No. CR06-42-JLR at 1). To support his argument,

1 counsel relied upon evaluations of petitioner by a physician and a psychologist. (*Id.*) Counsel  
2 characterized the psychologist's evaluation as "suggest[ing] that the crimes committed were a  
3 product of the influences that presented to her at about the time of the crimes . . . ." (Dkt. No.  
4 40 at 4). Counsel quoted directly from the evaluation which stated that "there is little question  
5 from the available information that the defendant in this case had a history of abuse that was  
6 directly related to the crimes in question." (*Id.*)

7 On October 22, 2007, a sentencing hearing was held before the Honorable James L.  
8 Robart. Counsel for the government argued, among other things, that petitioner had not been  
9 honest with the psychologist who prepared the evaluation and that this dishonesty compelled  
10 the government to seek a sentence of 37 months instead of 30 months. (Dkt. No. 6, Ex. 1 at 12-  
11 13). After hearing argument from the parties, Judge Robart commented on several of the  
12 factors that influence sentencing. First, regarding the nature of the offense, Judge Robart stated  
13 that he considered the offense committed by petitioner "to be a serious one." (*Id.* at 20-21). He  
14 continued: "It was multiple acts of fraud. And perhaps as important, the circumstances of the  
15 offense include the victimization of [petitioner's] family members. And therefore, I find that  
16 [the nature of the offense] to be very serious, bearing significant weight on the sentence to be  
17 imposed." (*Id.*)

18 Judge Robart then addressed the history and characteristics of petitioner. Judge Robart  
19 called counsel's argument based upon petitioner's medical history "very effective" and stated  
20 that he did not agree with the government's argument that petitioner had lied to the  
21 psychologist. (*Id.* at 22). However, Judge Robart also observed that petitioner had not been  
22 deterred in the past by time spent in prison and that she displayed a tendency "to blame  
23 everyone but herself for what happens." (*Id.* at 21). After considering all the appropriate  
24 factors, Judge Robart imposed a sentence at the low end of the range, 30 months in prison,  
25 followed by 5 years of supervised release. (*Id.* at 23).

26 Petitioner did not file a direct appeal. On October 23, 2008, petitioner filed the instant

1 motion under 28 U.S.C. § 2255 to vacate, set aside, or correct her sentence. (Dkt. No. 1). On  
2 October 28, 2008 this matter was referred to the undersigned Magistrate Judge pursuant to 28  
3 U.S.C. § 636(b) and Local Rules MJR 3 and 4. (Dkt. No. 4). The government filed an answer  
4 to petitioner's § 2255 motion on December 4, 2008. (Dkt. No. 6). Petitioner filed a response to  
5 the answer on December 22, 2008. (Dkt. No. 7). The matter is now ready for review.

#### 6 DISCUSSION

7 In her § 2255 motion, petitioner raises a single claim for relief based upon ineffective  
8 assistance of counsel. (Dkt. No. 1 at 5). Petitioner argues that she received constitutionally  
9 ineffective assistance of counsel because counsel's use of the psychologist's evaluation at  
10 sentencing prompted the government to seek a higher sentence. In order to prevail on such a  
11 claim, petitioner must establish two elements. First, she must establish that counsel's  
12 performance was deficient, *i.e.*, that it fell below an "objective standard of reasonableness"  
13 under "prevailing professional norms." *Strickland*, 466 U.S. at 687-88 (1984). Second, she  
14 must establish that he was prejudiced by counsel's deficient performance, *i.e.*, that "there is a  
15 reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding  
16 would have been different." *Strickland*, 466 U.S. at 694.

17 Petitioner fails to establish either element under *Strickland*. First, petitioner fails to  
18 show that counsel's performance was deficient. Judge Robart specifically noted that counsel's  
19 argument regarding petitioner's medical history was "very effective." (Dkt. No. 6, Ex. 1 at 22).  
20 Second, petitioner fails to satisfy the "prejudice" element of *Strickland*. While the transcript of  
21 the sentencing hearing reflects that counsel's use of the psychological evaluation did prompt the  
22 government to ask for a higher sentence, Judge Robart was not persuaded by the government  
23 and imposed a sentence *lower* than the government requested. Therefore, petitioner was not  
24 harmed by counsel's allegedly improper use of the psychologist's evaluation. Accordingly, her  
25 sole claim based upon ineffective assistance of counsel should be denied.

1 CONCLUSION

2 For the foregoing reasons, petitioner's motion under 28 U.S.C. § 2255 to vacate, set  
3 aside, or correct her sentence should be denied. Because the files and records in this case  
4 conclusively show that petitioner's motion is without merit, no evidentiary hearing is required.  
5 *See Baumann v. United States*, 693 F.2d 565, 570-71 (9<sup>th</sup> Cir. 1982). A proposed Order is  
6 attached.

7 DATED this 17th day of February, 2009.

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10 JAMES P. DONOHUE  
11 United States Magistrate Judge  
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